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No. 84-504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF BELL OPERATING COMPANY RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. This Court ruled in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930), that local telephone exchange costs must be apportioned between those attributable to interstate service and those attributable to local service. The Federal Communications Commission issued orders setting guidelines for the manner in which such costs, once allocated to interstate service, may be recovered by local phone companies. To recover a portion of these costs, the guidelines would impose charges on end users who receive access to interstate service through the local exchange. Did the decision below affirm the Commission's orders consistently with *Smith*?

2. Section 205(a) of the Communications Act, 47 U.S.C. §205(a), requires a "full opportunity for hearing" before the Commission may prescribe carrier charges. Did the decision below correctly decide that the procedures employed by the Commission were proper in this particular case, where, after a comprehensive six-year notice and comment proceeding, the Commission issued policies and rules that govern all local telephone companies and set forth the manner in which certain of their charges are to be structured and calculated?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF BELL OPERATING COMPANY RESPONDENTS IN OPPOSITION

The Bell Operating Companies,[1] Respondents here, intervened below in the Court of Appeals for the District of

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[1] The following companies join in this Brief: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, Wisconsin Telephone Company, New Jersey Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, New York Telephone Company, New England

Columbia Circuit in support of the Federal Communications Commission. Respondents submit this Brief in Opposition to the Petition of the National Association of State Utility Consumer Advocates ("NASUCA") and the South Carolina Consumer Advocate ("SCCA") for a Writ of Certiorari to review the Court of Appeals' decision.[2]

STATEMENT OF THE CASE

The Federal Communications Commission determined in a series of orders that the existing rate structure for recovering the interstate costs of local telephone exchange facilities that provide access to the nationwide telephone network should be replaced and established guidelines for new charges to recover such costs.[3] The Court of Appeals' decision below unanimously affirmed those orders.[4]

A petition to review the decision below has already been filed by the National Association of Regulatory Utility

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Telephone and Telegraph Company, Pacific Bell, Nevada Bell, and Southwestern Bell Telephone Company.

Each of the foregoing Bell Operating Companies is a wholly owned subsidiary of a Bell Regional Holding Company, that is, American Information Technologies Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group or Southwestern Bell Corporation. Each Regional Holding Company has outstanding securities in the hands of the public.

[2] Petitioners will sometimes be collectively referred to herein as "NASUCA."

[3] The Commission's *Third Report and Order*, its initial access charge order, is reported at 93 F.C.C.2d 241 (1983). The Commission subsequently modified this order on reconsideration, 48 Fed. Reg. 42,984 (1983), and on further reconsideration, 49 Fed. Reg. 7810 (1984).

[4] *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984). The Court of Appeals affirmed the Commission's orders in principal part, remanding for further consideration two limited aspects of the orders irrelevant to the issues here.

Commissioners ("NARUC") in No. 84-95. NASUCA, like NARUC, contends that the decision below should be reviewed because the Commission's orders, as affirmed by the Court of Appeals, conflict with this Court's decision in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930). NASUCA also contends that, contrary to the decision below, the Commission's failure to hold an evidentiary hearing violated the "full opportunity for hearing" requirement of Section 205(a) of the Communications Act, 47 U.S.C. §205(a).

Respondents' statement of the case pertinent to NASUCA's *Smith v. Illinois Bell* contentions is set forth in their brief in Opposition to the NARUC Petition. Insofar as NASUCA contends the Court of Appeals improperly ruled on the hearing issue, however, the following matters bear statement here.

The Commission commenced the proceeding reviewed below with a *Notice of Inquiry* issued over six years ago.[5] Key issues in the proceeding were whether long-distance service should be subject to direct competition and, if so, what reimbursement interstate services should make to local operating companies for use of the local exchange. The undertaking was nothing short of a full inquiry into the economic and rate structure of long-distance telephone service. Four supplemental notices of inquiry and proposed rulemaking followed the initial notice, each representing a refinement of the Commission's understanding of the

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[5] *MTS and WATS Market Structure: Notice of Inquiry and Proposed Rulemaking*, 67 F.C.C.2d 757 (1984).

issues requiring resolution.[6] Ultimately, the record underlying the orders reviewed below filled 46 volumes and contained approximately 17,000 pages of submissions by more than one hundred different parties.

After three rounds of comments and reply comments, in which Petitioners here did not participate, the Commission, on August 1, 1980, adopted its *Third Supplemental Notice.* The Commission concluded that a general policy of open entry in domestic long-distance services would be in the public interest. Accordingly, it set about to determine the structure for a new system of access charges that would compensate local telephone companies for the use of their plant to provide access to long-distance calls.

On May 27, 1982, after a fourth round of comments and reply comments, in which Petitioners again did not participate, the Commission adopted its *Fourth Supplemental Notice.* This *Notice* proposed rate structures imposing access charges both on long-distance carriers and directly on end users. A central goal was to overcome the difficult task of devising a local company compensation scheme that appropriately balanced a policy of placing costs on the customers for whom the costs were incurred with a policy of avoiding immediate and burdensome economic impacts on some customers.

A significant influence on the Commission's conduct of this proceeding was the settlement of the United States' an-

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[6] *Supplemental Notice of Inquiry and Proposed Rulemaking,* 73 F.C.C.2d 222 (1979) (*"First Supplemental Notice"); Second Supplemental Notice of Inquiry and Proposed Rulemaking,* 77 F.C.C.2d 224 (1980) (*"Second Supplemental Notice"*); *Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking,* 81 F.C.C.2d 177 (1980) (*"Third Supplemental Notice"*); *Fourth Supplemental Notice of Inquiry and Proposed Rulemaking,* 90 F.C.C.2d 135 (1982) (*"Fourth Supplemental Notice").*

titrust suit against AT&T. The settlement was announced in January 1982, between the issuance of the *Third* and *Fourth Supplemental Notices.* The divestiture and exchange access provisions of the proposed settlement necessitated, as a practical matter, that the Commission render a decision by late 1982 and have its plan in place by early 1984, when divestiture and the reorganization of AT&T then was expected. Faced with the interests of 1500 independent telephone companies and the Bell Companies, as well as the interests of numerous other parties, the Commission established an "ambitious" timetable for itself aimed at meeting this deadline.[7]

Even before the exigencies triggered by the settlement of the AT&T antitrust suit, however, the Commission had considered and rejected requests for protracted evidentiary proceedings. As the Commission explained as early as its *First Supplemental Notice:*

> We have noted claims that evidentiary hearings will provide the most effective mechanism for accurate fact-finding. However, that type of multiparty proceeding could become almost interminable, given the complexity of the issues which

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[7] As the Commission stated in its *Fourth Supplemental Notice,* 90 F.C.C.2d at 154:

> We anticipate that a final order . . . will be issued by the end of this year [1982]. If this goal is realized, access charges based on [the order] can be designed and actually in place by the end of the following year [1983]. This timetable, while ambitious, is expected to be sufficient to allow development of an access charge that will resolve the major policy difficulties facing this Commission.

See also Third Report and Order, 93 F.C.C.2d at 246 (determining that the public interest required the Commission to set the basic structure for the access charges that would inevitably result upon divestiture).

> we must resolve. We are endeavoring to establish an entry policy for the 1980's. A procedural option which would preclude us from reaching a final decision at or near the beginning of that decade would not be consistent with that goal.[8]

Thus, with the AT&T settlement, the Commission's early concerns for timeliness became not only prescient but also imperative.[9]

After yet a fifth round of comments and reply comments, including, for the first time, a brief nine-page submission by Petitioners here, the Commission adopted a *Third Report and Order ("Access Charge Order")* setting forth its access charge plan.[10] It determined that an equitable allocation of costs required the imposition of a system combining carrier and end user charges. It, therefore, adopted "rules that will determine the rates interexchange carriers and end users will pay for access to local telephone company facilities. . . ."[11] The Commission also stated that it "expect[ed] access tariffs to be filed. . .

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[8] *First Supplemental Notice,* 73 F.C.C.2d at 232.

[9] Also bearing on the Commission's timetable during most of its proceeding was the duration of the so-called "ENFIA Agreement." Negotiated under Commission auspices, this agreement between local Bell companies and long-distance carriers other than AT&T provided for payments by these long-distance carriers to the local companies for use of the local exchange. The companies and carriers executed the agreement pending Commission establishment of an access charge plan, but it was due to expire in early 1984.

[10] 93 F.C.C.2d 241 (1983). As it had undertaken in its *Fourth Supplemental Notice,* the Commission adopted its order on December 27, 1982.

[11] *Id.* at 245-46. *See also id.* at 256 ("Although the rules we are adopting will not establish the precise charge for most access elements, we are establishing many of the steps that the carriers must follow in order to compute access charges").

in conformance with the rules adopted" and so ordered.[12] Notwithstanding the inclusion in the rules of limits on certain charges, these company tariffs, not the Commission's rules, would impose the actual access charges and would be themselves subject to review in subsequent proceedings.[13]

The Commission explained in the *Access Charge Order* that the Court of Appeals' decision in *American Telephone & Telegraph Co. v. FCC,* 572 F.2d 17 (2d Cir.), *cert. denied,* 439 U.S. 875 (1978), sanctioned the procedures it employed for adopting its access tariff guidelines. It also noted that the Court of Appeals' decision in *MCI Telecommunications Corp. v. FCC,* 627 F.2d 322 (D.C. Cir. 1980), excused absolute certainty and precision in the rates that would result from calculations in accordance with its guidelines and the cost recoveries those rates would effect.

Any serious error or misjudgment in the *Access Charge Order,* however, was subject to correction in reconsideration and further reconsideration proceedings, where the Commission twice responded to challenges to its plan and, as a result, substantially modified that plan.[14] Neither Petitioner NASUCA nor Petitioner SCCA participated in the pleading cycles on reconsideration and further reconsideration.

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[12] *Id.* at 246, 341.

[13] The Commission has commenced and partially completed just such proceedings. *See Investigation of Access and Divestiture Related Tariffs,* CC Docket No. 83-1145. There, too, Petitioners' participation has been minimal.

[14] *See generally Memorandum Opinion and Order,* 48 Fed. Reg. 42,984 (1983) (*"Reconsideration Order"*); *Memoradum Opinion and Order,* 49 Fed. Reg. 7810 (1984) (*"Further Reconsideration Order"*).

In light of the manner in which the Commission had conducted its proceedings, the Court of Appeals was not detained by Petitioners' claim on review below that the Commission had failed to conduct evidentiary hearings in accordance with Section 205(a) of the Communications Act. The court held that the Commission's comprehensive and extensive notice and comment procedures were sufficient "to develop policies for the interstate long-distance market and [to] set prospective, policy-implementing rules."[15] The court noted that the Commission neither set a specific revenue requirement for any carrier nor determined the legality of any specific carrier's rates.[16] It was careful not to express any opinion on whether the Communications Act or longstanding Commission policy calls for an evidentiary hearing where the Commission determines, for example, whether a carrier-filed rate is just and reasonable.[17] The court also found that the Commission itself had adequately explained its decision not to convene evidentiary hearings.[18]

SUMMARY OF ARGUMENT

Neither of the grounds advanced by Petitioners warrants a grant of their Petition. First, the Commission's orders and the Court of Appeals' affirmance do not conflict with *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930), or with any other decision of this Court or any other court of appeals. *Smith* only established the requirement that the costs of the local telephone exchange be

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[15] *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d at 1120.

[16] *Id.*

[17] *Id.* at 1121 n.29.

[18] *Id.* at 1121.

allocated for ratemaking purposes between state and federal jurisdictions. The Commission's orders below merely determined how local telephone exchange costs, already allocated to the Commission's interstate jurisdiction in compliance with *Smith,* are to be recovered.

Second, although an evidentiary hearing is required where, for example, a carrier invokes Section 205(a) when its rates are challenged, the Court of Appeals properly decided that the Commission's procedures here were adequate for developing the information necessary to establish guidelines governing the lawfulness of access charges. The Commission's procedures, moreover, developed the information necessary for the actions it took. This Court, therefore, is not confronted with an agency that has become unmindful of its procedural obligations or a court that has lost sight of the standards applicable to agency conduct. Indeed, Petitioners' claim that the Commission's procedures here are "unprecedented."[19] — a claim Respondents reject — belies any such deficiency and itself presupposes an agency quite sensitized to affording procedural safeguards. Finally, Petitioners' interests do not entitle them to an evidentiary hearing under Section 205(a), in any case, or support review here.

ARGUMENT

I. There Is No Conflict Between the Decision Below and This Court's Decision in *Smith v. Illinois Bell Telephone Co.*

This Petition adds nothing to the NARUC Petition's contention that the decision below conflicts with this Court's decision in *Smith v. Illinois Bell Telephone Co.*

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[19] Petition at 19.

The Bell Operating Company Respondents addressed this argument at pages 11-13 of their Brief in Opposition to NARUC's Petition, filed September 19, 1984 in No. 84-95.

Briefly, *Smith* merely required that the local exchange's costs be apportioned between those costs attributable to interstate service and those not so attributable. *Smith* did not address the discretion available to the Commission or the state utility commissions in establishing methods for recovering these costs once they are apportioned to the jurisdiction of each. *Smith*, therefore, simply does not bear on this case.

The Commission's end user charge is an interstate charge calculated to recover costs already apportioned to the interstate jurisdiction in full compliance with *Smith*. The fact that the end user charge may in effect operate as a condition of all telephone service, local and interstate, does not make it an intrastate rate. As discussed at greater length in Respondents' opposition to NARUC's Petition, because the same facilities are used for local and interstate service, local and interstate access are inseparable. Payment of the end user charge, therefore, is an unavoidable condition of local service. Accordingly, the Commission's action and the Court of Appeals' affirmance do not conflict with *Smith*, or with any other decision of this Court or any other court of appeals. Accordingly, review on this ground is unwarranted.

II. The Decision Below Correctly Affirmed the Commission's Orders.

NASUCA claims that the Court of Appeals incorrectly affirmed the Commission's decision not to institute evi-

dentiary hearings before establishing its policies for the structure of interstate service and its guidelines for computing access charges. The Court of Appeals, however, carefully distinguished the situation where a carrier-filed rate is subjected to Commission review, or where specific rates or revenue requirements are prescribed for a particular carrier, and properly determined that evidentiary hearings were not required in this particular case. In addition, the procedures followed by the Commission adequately developed the information necessary for the actions it took. Finally, NASUCA's interests neither entitle it to a protracted evidentiary hearing under Section 205(a) of the Communications Act nor support review here. NASUCA's second ground for review, therefore, also does not warrant a grant of its Petition.

A. The Court of Appeals Properly Determined That the Procedures Followed by the Commission in This Particular Case Were Sufficient for Commission Actions Establishing Policies for the Structure of Interstate Service and Guidelines for the Lawfulness of Access Charges.

The Commission established policies for the structure of interstate telephone service and guidelines that would assure the development of tariffs implementing its policies. Although the Commission did specify certain rate limitations for some end user charges during an initial transition period, basically the Commission established rules and procedures pursuant to which the many local exchange carriers were to compute and cost justify several thousand individual access rates. The Commission left the filing and review of actual tariffs – which would, in fact,

vary from company to company and from state to state — to a separate proceeding, which is now underway.[20]

Thus, although the Commission's orders imposed several requirements whose satisfaction would presumptively establish a tariff's lawfulness, the Commission, as the Court of Appeals determined, had adopted "policy-implementing rules" rather than determined specific revenue requirements or specific rates for particular carriers.[21] The court decided that the Commission's procedures sufficed for the adoption of such rules.[22] This decision was correct.

In assessing the sufficiency of the Commission's procedures, "the primary focus of [the] inquiry is . . . 'on the requirements of the particular case.' " *American Telephone & Telegraph Co. v. FCC,* 572 F.2d 17, 22 (2d Cir.), *cert. denied,* 439 U.S. 875 (1978).[23] Making this case-

[20] *See Investigation of Access and Divestiture Related Tariffs,* CC Docket No. 83-1145. NASUCA's Petition (at 20 n.9, 28) creates the misimpression that the Commission imposed a flat nation-wide multiline business access charge of $6 per line per month. The Commission, however, merely set $6 as the maximum allowable charge. The great majority of the Bell Operating Company Respondents actually filed tariffs for less than the maximum. Nationwide, the filed tariff charges ranged from $2.78 to the $6 maximum. In the states served by the C&P Telephone Company, the charges varied from $3.23 in Maryland to $4.14 in the District of Columbia, $5.34 in Virginia and $6.00 in West Virginia. These variations reflect the differing costs of service in the individual jurisdictions.

[21] *National Ass'n of Regulatory Utility Comm'rs v. FCC,* 737 F.2d at 1120.

[22] *Id.* at 1120-21.

[23] Petitioners claim that the Commission and the Court of Appeals improperly based their procedural decision on *American Tel. & Tel. Co. v. FCC* because that case involved practices while this case involves rates. By its terms, however, Section 205(a) of the Communications Act authorizes the Commission to invalidate both charges and practices and to prescribe the same. It also imposes the "full opportunity for hearing" requirement on all such actions. Petitioners'

specific determination required that the Court of Appeals, among other things, "distinguish between 'proceedings for the purpose of promulgating policy-type rules or standards . . . and proceedings designed to adjudicate disputed facts in particular cases.' " *Id.* Notice and comment proceedings are sufficient for the first category of proceedings, *id.* at 23, and, therefore, sufficed for the "policy-implementing rules" that the Court of Appeals determined had been adopted in the proceeding before it. *Accord Western Union Telegraph Co. v. FCC*, 665 F.2d 1126, 1151 (D.C. Cir. 1981) ("It is settled law that FCC policy decisions impacting, but not setting, rates may, when appropriate, be made in an informal rulemaking rather than an adjudicatory ratemaking proceeding").[24]

The nature of the interests involved in a proceeding plainly bears on its procedural treatment. Here, the tariffs

distinction, therefore, is without merit. The Court of Appeals' decision in *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975), moreover, does not dictate a contrary result. There, the Commission clearly replaced the rate of return element of a particular carrier's rates with a different rate of return prescribed by the Commission. As Section 205(a) required, the Commission had afforded the carrier an evidentiary hearing, and the carrier did not challenge the adequacy of the procedures afforded it.

[24]That the Commission's rules, moreover, would establish the lawfulness of tariffs developed in conformance with them did not change their legislative character or require their adoption pursuant to adjudicatory proceedings. *See United States v. Florida East Coast Ry.*, 410 U.S. 224, 246 (1973) (adjudicatory proceeding not required where rate setting decision was "applicable across the board to all . . . common carriers," there was "no effort to single out any particular [carrier] for special consideration based on its own peculiar circumstances," and decision was "for prospective application only, rather than adjudicating a particular set of disputed facts"); *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 388-89 (1932) (prospectively binding nature of rate setting order could not be ignored in order to subject complying carrier to reparations, even though order was issued in an evidentiary proceeding).

of neither one nor a few carriers were at issue. Rather, the broader interests of numerous parties – some 1500 local exchange carriers, several interstate carriers and countless end users – were implicated. The particular proceeding below, therefore, was simply not conducive to nor, indeed, appropriate for trial-type procedures.[25] The Court of Appeals, by carefully distinguishing the situation "where the Commission determines, for example, whether a carrier-filed rate is just and reasonable,"[26] showed proper sensitivity to the nature of the interests involved.[27]

In short, the Court of Appeals correctly assessed the adequacy of the Commission's procedures. The result it reached is amply supported under applicable law.[28] Re-

[25] *See United States v. Florida East Coast Ry.*, 410 U.S. at 245 (there is a "recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards . . . and proceedings designed to adjudicate disputed facts in particular cases"); *American Tel. & Tel. Co. v. FCC*, 572 F.2d at 23 (rejecting trial-type hearings where the issues involve "legislative" facts and forecasts that cannot be decisively resolved by testimony).

[26] *National Ass'n of Regulatory Utility Comm'rs v FCC*, 737 F.2d at 1121 n.29.

[27] As the Court of Appeals also determined, the Commission itself explained its decision to use notice and comment procedures. *See id.* at 1121.

[28] In this regard, NASUCA's reliance on Rule 17.1(a) of this Court is misplaced. The exercise of this Court's discretion under Rule 17.1(a) to address a departure from "the accepted and usual course of judicial proceedings," of course, is appropriate only in the discharge of the Court's responsibility for supervising the federal judicial system. *See generally* J. Moore, H. Bendix & B. Ringle, 13 *Moore's Federal Practice*, ¶817.27, at SC17-31 (2d ed. 1982). There is here, however, no claim of any departure from "the accepted and usual course of judicial proceedings." Indeed, the Court of Appeals properly ruled in accordance with applicable law. Rather, there is here merely an allegation of irregularity in the conduct of an administrative agency's proceedings and an ordinary request for this Court's review of a lower court's decision upholding the agency's procedures. Rule 17.1(a), therefore, is simply not applicable.

view here, therefore, is unwarranted. Indeed, the correction of procedural errors in federal agency proceedings is the customary province of the courts of appeals, and this Court will ordinarily not intervene in such matters.[29] Even were there error below, nothing here warrants a departure from this principle.

B. The Procedures Followed by the Commission Here Adequately Developed the Information Necessary for the Actions It Took.

Not only were the Commission's procedures lawful, as the Court of Appeals correctly decided, but also those procedures did, in fact, develop the information needed for the actions the Commission took. Indeed, the depth of the information the Commission developed probably went beyond what was necessary as a matter of law.

The extensive scope of the Commission's proceeding, in terms of the number of pleading cycles and volume of information submitted has already been recounted in the statement above. Moreover, a careful review of the proceeding's several notices and orders reveals not a chaotic amassing of information but an orderly and increasingly detailed evolution of the issues bearing on the Commis-

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[29] *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951); Friendly, J., *Mr. Justice Frankfurter*, 51 Va. L. Rev. 556 (1965); *See also Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment [it is] asked to review"); R. Stern & E. Gressman, *Supreme Court Practice* 297-98 (5th ed. 1978) ("It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions. . . . Hence, the Court generally will not grant certiorari just because the decision below may be erroneous").

sion's ultimate actions and the identification of the information needed to resolve those issues.[30]

In many instances, necessary information was readily available to the Commission.[31] The Commission, however, was not content to leave acquisition of needed information to chance. It also provided certain assurances that all necessary information would be available, both to itself and parties participating in the proceeding.

For example, the Commission empowered the "Chief of the Common Carrier Bureau [to] direct certain carriers to submit empirical data and other information" and provided that "those information requests [would] be made available to participants in this proceeding."[32] The Commis-

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[30] *See, e.g., First Supplemental Notice,* 73 F.C.C.2d at 229, 231-32, 237-41; *Second Supplemental Notice,* 77 F.C.C.2d at 244, 246; *Third Supplemental Notice,* 81 F.C.C.2d at 178, 213-14; *Fourth Supplemental Notice,* 90 F.C.C.2d at 136-37, 145, 147-48.

[31] For example, the $8.5 billion estimated revenue requirement referred to in the *Access Charge Order,* 93 F.C.C.2d at 250, and characterized by Petitioners as without proper support, is merely the interstate revenue requirement for non-traffic sensitive plant derived from the so-called "jurisdictional separations process." *See id.* at 246. This process, which is recurring in nature, determines which local exchange costs are subject to state jurisdiction and which are subject to Commission jurisdiction. Thus, the Commission did not prescribe the $8.5 billion requirement in the proceeding reviewed below. It simply employed costs that had been readily determined pursuant to standards properly established in other proceedings, specified how those costs would be recovered, and used the costs to limit the access charges carriers themselves could lawfully file with the Commission. The Commission's reference to separate proceedings for this purpose was entirely within its discretion. This Court has stressed that regulatory agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *FCC v. Pottsville Broadcasting Co.,* 309 U.S. 134, 143 (1940). *See also Nader v. FCC,* 520 F.2d at 195-98.

[32] *First Supplemental Notice,* 73 F.C.C.2d at 232.

sion encouraged *ex parte* contacts with the Commission and its staff to assure an understanding of the matters being resolved.[33] To "encourage the development of a broadly based record," the Commission also decided to "supplement [its] usual public notice procedures by directing the Consumer Assistance Office to distribute copies of [the *First Supplemental Notice*] to consumer groups" like Petitioners here.[34] A device was even provided to enable participants to conduct limited discovery of carriers.[35]

Finally, the Commission directed the appropriate Commission staff to initiate its own concurrent examination.[36] In so doing, the Commission sought to rely on the expertise gained from no less than half a century of regulating telephone rates and practices.[37] This experience — which has included the review of countless tariffs, financial reports and line construction and extension requests — provided an intimate understanding of carriers' costs, their rate structures and the economics of telephone service generally.

Ultimately, the Commission's actions were subject to reevaluation upon reconsideration and even further reconsideration of the *Access Charge Order*. These two stages of the Commission's proceeding provided ample opportunity

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[33] *Fourth Supplemental Notice*, 90 F.C.C.2d at 155-56.

[34] *First Supplemental Notice*, 73 F.C.C.2d at 235.

[35] *Id.* at 244 ("We are . . . inviting persons who plan to submit reply comments to submit . . . requests for information to the Chief of the Common Carrier Bureau . . . . The Chief of the Common Carrier Bureau will then direct appropriate carriers to submit information to him which is responsive to information requests which he finds to be reasonable and relevant to this Inquiry"). After its utility had passed, this "discovery" device was discontinued. *See Second Supplemental Notice*, 77 F.C.C.2d at 225-26.

[36] *First Supplemental Notice*, 73 F.C.C.2d at 232.

[37] *See id.* at 231-32.

to identify deficiencies in needed information and, as the Court of Appeals found, to contest all information on which the Commission had based its decision.[38] Plainly, the Commission's procedures afforded the fullest opportunity to explore the issues and facts that was practically possible under the circumstances of this major inquiry.

To be sure, the Commission's procedures were not designed to guarantee an error-free result. That aim would only have crippled the administrative process and, in any case, was not required.[39] The Commission, however, was not unmindful of the possibility for error. It specifically provided that five years into the implementation of its access charge scheme, it "[would] evaluate the rules and policies adopted . . . and, if necessary, . . . make adjustments needed to promote the expressed goals of [its] proceeding."[40] Additional opportunity for rectification, moreover, was afforded through the Commission's proceedings in its Docket No. 83-1145, where the access

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[38] *See National Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d at 1121-22.

[39] *Cf. MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980) ("Ratemaking theories may change; new information may become relevant; one proceeding may have to take account of another. But there must be some reasonably prompt decisionmaking point at which the FCC says: 'To the best of our knowledge and expertise at this time, the rates are just and reasonable. Perfect, perhaps not, but just and reasonable, yes.' That is all the [Communications Act] requires").

[40] *Access Charge Order*, 93 F.C.C.2d at 244. *See United States v. Florida East Coast Ry.*, 410 U.S. at 242 (upholding nonadjudicatory procedure where agency "announced willingness to consider proposals for modification after operating experience had been acquired").

tariffs actually filed by carriers have been the subject of review.[41]

In short, the Commission's procedures did adequately develop the information necessary for its actions. The Court of Appeals, therefore, was fully justified in ruling that the procedures followed by the Commission in this case were proper.

C. Petitioners' Interests Neither Entitle Them to a Protracted Hearing Under Section 205(a) of the Communications Act Nor Support Review Here.

Section 205(a) of the Communications Act provides that the Commission may prescribe a rate or practice only when it determines "after full opportunity for hearing . . . that any charge, classification or regulation or practice of any carrier or carriers is or will be in violation of . . . [t]he Act." The "full opportunity for hearing" requirement of Section 205(a) exists essentially to protect the carrier. It basically serves as a procedural safeguard, designed to assure that the rates which the carrier is permitted to charge will cover its costs and allow it a fair return. In particular, a carrier's tariff cannot be replaced by a Commission prescription unless the Commission first finds an actual or incipient violation of the Act, and that finding may not be made unless the carrier insisting on an opportunity for a hearing has been afforded that opportunity.[42]

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[41] *See Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145.

[42] *See Nader v. FCC*, 520 F.2d at 204:

> The essential elements of a valid prescription order are a full opportunity to be heard and a finding that the action taken is just and reasonable . . . . There can be no doubt that AT&T had a full hearing on the rate-of-return issue and has not appealed that determination.

NASUCA itself, therefore, had no right to an evidentiary hearing pursuant to Section 205(a), even if one were required here.[43] Indeed, it would be quite an anomaly were NASUCA to have had such a right. Were it so, NASUCA could have demanded a trial-type hearing in the circumstances of this case, when it would not be entitled to a hearing upon its own complaint to the Commission about a carrier's rates pursuant to Sections 207-209 of the Communications Act.[44]

Moreover, NASUCA makes no claim that it was actually prejudiced by the procedures employed in the proceeding reviewed below or its outcome. Although its Petition here questions the basis for some of the Commission's findings, NASUCA does not claim it was unable to question those findings before the Commission itself. Nor does it now point to or claim that there was any other information the Commission's procedures prevented it from developing or challenging. Indeed, NASUCA's participation before the Commission is noticeable mostly for its virtual absence. Finally, NASUCA does not attempt to show how it or, more precisely, the interests it represents will be harmed by the Commission's access charge decisions.[45] In

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[43] *Cf. Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397, 403 (D.C. Cir. 1975) (Commission's improper denial of constitutionally required notice and hearing procedures prior to its obscenity determination against broadcast licensee cannot be asserted by public as procedural error).

[44] *See* 47 U.S.C. §§207-209; 47 C.F.R. §§1.701 *et seq.*

[45] In fact, it is not at all clear which interests, if any, NASUCA represents or how they have been prejudiced. End user interests vary and diverge. Certain end users support the Commission's access charge plan. For example, although NASUCA claims that multi-line business end users currently paying a $6 monthly access charge would reject the Court of Appeals' conclusion that the Commission did not determine the legality of specific rates (Petition at p. 21), the fact is

short, therefore, NASUCA has shown neither the injury to an arguably protected interest nor the "injury in fact" necessary to avoid ineligibility on standing grounds. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Sierra Club v. Morton*, 405 U.S. 727 (1972).[46]

At the same time, the affected carriers have made no complaint that their procedural rights under Section 205(a) have been violated or that they are otherwise prejudiced. It would be inappropriate, therefore, for this Court to grant certiorari to review such an issue at the behest of a noncarrier.

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that many of those end users accept the monthly charge. Since the monthly charge permits lower usage-based charges for interstate calls, it is on balance preferable to many multi-line business customers.

[46] Even if Petitioners had an arguable right to an evidentiary hearing and it were apparent how the Commission's procedures had prejudiced them, Petitioners' failure to show clearly how their constituents' interests have been injured by the substance of the access charge orders also precludes standing here. *Cf. Public Utilities Comm'n v. United States*, 356 F.2d 236, 241 (9th Cir. 1966) (failure to show deprivation of property precludes procedural due process claim based on denial of notice and opportunity to be heard).

CONCLUSION

For the foregoing reasons, this Court should not issue a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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